U.S. Department of Labor

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Issue Date: 22 August 2003

CASE NO: 2003-STA-00030

In the Matter of

KENNETH DENSIENSKI
Complainant

v.

LA CORTE FARM EQUIPMENT
Respondent

Appearances:

Kenneth Densienski, pro se
For Complainant

Thomas Rubing, pro se
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act, hereinafter the "Act", 49 U.S.C. §31105 (1982); which prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities.

Complainant filed his complaint on January 14, 2003, and on March 3, 2003, the Occupational Safety and Health Administration of the U. S. Department of Labor issued its investigate findings to the effect that the complaint had no merit (ALJ 1).[1]

[1] References are: "ALJ"-Administrative Law Judge exhibits; "Tr.-transcript of hearing; R-Respondent exhibits; "C" - Complainant exhibits.

Complainant thereafter requested a hearing (ALJ 2) and an initial notice of hearing was issued on May 2, 2003 (ALJ 3) upon the assignment of this case to the undersigned. The matter was tried on June 9, 2003 and July 28, 2003 in New York, New York.

THE LAW

49 U.S.C. §31105. Employee protections

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -
>
> (A) the employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulations, standard, or other, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because -
>
> (i) the operation violates a regulation, standard, or other of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

Complainant argues that Respondent violated Section (a)(1) (A)of the Act in discharging him from its employ on December 20,2002. He seeks an award for back and front wages (Tr. 52).

Respondent avers that Complainant was discharged for legitimate, non-discriminatory reasons (Tr.11,12-13).

FINDING OF FACT AND CONCLUSIONS OF LAW

Under the burdens of proof and production in 'whistleblower' proceedings, Complainant must first make a prima facie showing that protected activity motivated Respondent's decision to take an adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. Complainant must then establish that the reason proffered by Respondent is pretextual. At all times, Complainant has the burden of establishing that the real reason for his discharge was discriminatory. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993); Thomas v. Arizona Public Service Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20.

In order to establish a prima facie case, a Complainant must show that: (1) he engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employee took some adverse action against him. Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 14, 1995, slip op. at 9, citing Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8. Additionally, the Complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); McCuistion v. TVA, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 5-6. This inference of causation can be raised by the temporary proximity between the protected activity and the adverse action. Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec., January 19, 1993, slip op. at 13; Bergeron v. Aulenback Transp., Inc., 91-STA-38, Sec. Dec., June 4, 1992, slip op. at 3. Williams v. Southern Coaches, Case No. 94-STA-44 Secty Dec. 9/11/95.

I find that Complainant has established a prima facie of violation of the Act.

On December 19, 2002, the day before he was fired, Complainant advised Mr. Rubing (Respondent's manager who eventually fired Complainant) and/or Mr.La Corte (Respondent's owner) and/or Mr. Hamilton (Respondent's Service Manager) of various safety complaints relative to the vehicle he was using to make deliveries (Tr. 7,et.seq.; 24; 25; 33; 34, 35; 36;). As to Mr. Rubing, he admits at least one of these complaints was known to him prior to the discharge of Complainant. As to Messers. La Corte and Hamilton, Complainant's testimony is not refuted. I find such communication to be an activity protected under Section (a)(1)(A) of the Act. See Yellow Freight Sys. Inc. v. Reich, 27 F.3rd 1333 (6th Cir. 1994), holding that the Act's complaint section protects an employee's safety complaints to managers/owners.

There is no question that Respondent took adverse employment action against Complainant, i.e., Complainant was discharged. Finally, I find that Complainant has established, by inference, that his protected activity was the likely reason for the adverse employment action because of the temporal proximity between the protected activity (December 19, 2002) and his termination (December 20, 2002). Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec. 1/19/93; Bergeron v. Aulenback Trans. Inc., 91-STA-38, Sec. Dec. 6/4/92.

Respondent defends with the assertion that Complainant was discharged for legitimate reasons, that is, because he caused "- - disharmony within the [business] " (Tr.11), "- - complained about everything", and had a history of lateness (Tr.12). This pattern of behavior, per Mr. Rubing, had persisted for some time, and this history eventually caused Complainant's dismissal. The day of reckoning, however, did not come until December 20, 2002. Moreover, Respondent argues that its historical sensitivity to safety issues raised by Complainant, as witnessed by its ready willingness to make repairs whenever needed (see R2), belies a discharge due to Complainant's raising of safety issues.

But, there exists no evidence of a previous record of serious warnings to Complainant of prospective adverse employment action contemplated by Respondent relative to the alleged previous/ongoing lateness infractions or "disharmonious" behavior[2]. More importantly, however, the timing of the discharge so near to the making of safety complaints is particularly compelling in this case, to say the least. And, the (temporal proximity) inference of discriminatory discharge drawn therefrom is consequently more difficult to overcome. The "straw that broke the camel's back" came at an importuned time for Respondent, viz a viz its termination of Complainant, in that high quality evidence must be produce in order to overcome the aforenoted inference due to the closeness in time between Complainant's expression of safety concerns and this termination. Making matters even worse for Respondent, its only witness (as well as Mr. Rubing Tr. 12) freely admitted that Complainant was considered by nearly everybody to be a "pain" insofar as his complaining (including petty, but nonetheless valid, safety complaints) was concerned (Tr. 77;87). This scenario suggests that part of the "disharmony" among the employees, for which Complainant was fired, may have included the making of complaints related to vehicle safety issues. Also, that Respondent demonstrated payment of various vehicle repair bills, dating back nearly two years up to a month prior to the discharge (R2), does not compellingly negate a wrongful firing of Complainant.

Based on a review of the record evidence as a whole, I am unable to conclude that Respondent has produced evidence sufficient to overcome the inference of discriminatory discharge of Complainant.

RECOMMENDED ORDER

On the basis of the forgoing, Respondent shall pay Complainant:

[2] Complainant testified that he was employed by Respondent for approximately five (5) years. (Tr. 13), but later apparently agreed that he was employed for 3-1/2 years (Tr. 90).

(1) Back Pay- from December 20, 2002 to April 28, 2003, less $4,507.20[3] unemployment compensation[4].

(2) Front Pay -of $120.00 per week[5] from April 29, 2003 through the present and continuing[6].

A

RALPH A. ROMANO
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, 200 Constitution Ave., N.W., Washington, D.C. 20210. *See* 29 C.F.R.§1978.109(a); 61 Fed. Reg. 19978 (1996).

[3] See C2; Tr-70.

[4] The parties agreed to this deduction from any award of back pay (Tr. 62).

[5] Any party may in the future, if and when appropriate, motion for modification of this amount upon production of evidence warranting same. Or, the parties may agree, without motion, to any appropriate modification.

[6] This amount represents a $3.00 per hour difference @40 hours) between Complainant's per hour pay with Respondent ($13.00) and his new job per hour pay ($10.00) (Tr. 70).